



Decision and Reasons for Decision

Application Number: 210151

Applicant: Mr E Knibb

Respondent: Queensland Health

Decision Date: 29 June 2007

Catchwords: **FREEDOM OF INFORMATION – Section 44(1) of the *Freedom of Information Act 1992 (Qld)* – personal affairs – applicant convicted of offence – applicant seeks access to forensic evidence – whether release of information is in the public interest**

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Reasons for Decision

Background

1. The applicant seeks review of a decision of Queensland Health (QH) to refuse him access, under the *Freedom of Information Act 1992* (Qld) (FOI Act) to documents in response to his freedom of information application dated 23 December 2005 (FOI application).
2. In his FOI Application to QH the applicant stated:

I am currently imprisoned at Maryborough Correctional Centre where I am serving a life sentence for the murder of Pursuant to section 25 of the Freedom of Information Act 1992 (Qld) I am seeking any information that your department may have on me, ...'s death and/or the relevant court cases. In particular, I am seeking:

- *my case file;*
- *the laboratory case notes from Dr Harmon*
- *an inventory list of what crime scene exhibits are still available for testing, and an approximate quantity of the remaining DNA samples for this case;*
- *details of any forensic evidence held there (or where it is held);*
- *the pathology report;*
- *any other reports held by Queensland Health;*
- *any other information, statements or other documents held by Queensland Health pertaining to my case or the death of*

3. The Griffith University Innocence Project (GUIP) has assisted the applicant throughout the review process, though the GUIP is not the applicant's legal representative.
4. In a decision dated 28 September 2006, Kevin Barwick, A/Policy Officer, Administrative Law Team, QH, decided to grant the applicant full access to 38 pages and partial access to 21 pages and to refuse the applicant access to 93 pages.
5. By application dated 16 October 2006 the applicant sought internal review of Mr Barwick's decision.
6. In a decision dated 20 December 2006, received by the GUIP on 2 January 2007, Dr Jeanette Young, Chief Health Officer, QH, affirmed Mr Barwick's decision.
7. By application dated 12 January 2007, attaching a letter dated 10 January 2007, received by this Office on 25 January 2007, the applicant sought external review of Dr Young's decision.

Steps taken in the external review process

8. By letter dated 1 February 2007 this Office sought copies of the Matter in Issue and other relevant documentation from QH.
9. On 30 January 2007, a staff member of this Office sought information from a Senior Crown Prosecutor of the Department of Public Prosecutions (DPP) regarding disclosure processes in criminal trials.
10. On 9 February 2007, QH provided copies of the documents requested at 8 above.
11. On 14 May 2007, a staff member of this Office and I met with 3 members of the QH administrative law team and the Chief Scientist. At that meeting:

- I indicated to QH that it was my preliminary view that the Matter in Issue was prima-facie exempt
 - QH provided oral submissions regarding the public interest considerations against disclosure of the Matter in Issue.
12. In an email dated 28 May 2007, QH provided further submissions regarding the public interest considerations against disclosure.
 13. By letter dated 28 May 2007, I indicated to the applicant that it was my preliminary view that the Matter in Issue qualified for exemption pursuant to section 44(1) of the FOI Act.
 14. In a telephone discussion on 29 May 2007, a staff member of this Office conveyed to Ms Weathered my preliminary view that the Matter in Issue qualified for exemption pursuant to section 44(1) of the FOI Act.
 15. By letter dated 7 June 2007, the applicant provided submissions in support of his case.
 16. In making my decision in this matter, I have taken the following into account:
 - the applicant's FOI application dated 23 December 2005, application for internal review dated 16 October 2006 and application for external review dated 12 January 2007
 - Mr Barwick's initial decision dated 28 September 2006 and Dr Young's internal review decision dated 20 December 2006
 - email from QH dated 28 May 2007
 - the applicant's submissions dated 7 June 2007, received by this Office on 15 June 2007
 - File notes of telephone conversations and discussions between staff of this Office and:
 - a) Senior Crown Prosecutor, DPP, regarding disclosure processes in criminal trials
 - b) administrative law personnel and the Chief Scientist, QH, regarding the matters set out above in paragraph 11
 - c) Ms Weathered, GUIP, regarding the matters set out above in paragraph 14.

Matter in issue

17. The matter in issue in this review comprises 93 full pages and 21 partial pages to which the applicant has been refused access by QH (Matter in Issue).

Findings

Section 44(1) of the FOI Act

18. Section 44(1) of the FOI Act provides that:

44 Matter affecting personal affairs

- (1) *Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

19. The test for whether matter qualifies for exemption under section 44(1) of the FOI Act is in two parts, as follows:
- a) Would disclosure of the Matter in Issue disclose information that is properly characterised as information concerning the personal affairs of a person?
 - b) If (a) is answered affirmatively, a public interest consideration favouring non-disclosure is established and the matter in issue is exempt, unless there are public interest considerations favouring disclosure which outweigh all identifiable public interest considerations favouring non-disclosure, so as to warrant a finding that disclosure of the matter in issue would, on balance, be in the public interest.

Does the Matter in Issue concern the personal affairs of a person?

20. I am satisfied that the first limb of the above test is satisfied. My reasons are set out below.
21. In *Stewart and Department of Transport* (1993) 1 QAR 227 (*Stewart*), the Information Commissioner said that information concerns the 'personal affairs of a person' if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase 'personal affairs', that phrase has a well accepted core meaning which includes:
- family and marital relationships;
 - health or ill health;
 - relationships and emotional ties with other people; and
 - domestic responsibilities or financial obligations.
22. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.
23. The Matter in Issue is comprised of:
- a) documents relating to a post-mortem examination
 - b) the mobile telephone number of a third party

Post-mortem documents

24. Section 44(1) of the FOI Act anticipates that a person can have personal affairs, even though that person is no longer living. I am satisfied that details of a post-mortem examination are intensely personal and are prima-facie exempt pursuant to section 44(1) of the FOI Act.

Mobile telephone number

25. Mobile telephone numbers are not generally listed in telephone directories and access to them is generally at the discretion of the individual. There is no information before me to suggest that the mobile telephone details of the third party are publicly available and I am therefore satisfied that the mobile telephone number of the third party is properly characterised as the personal affairs of the third party.

Public Interest Test

26. Satisfaction of the first limb of the test under section 44(1) of the FOI Act establishes a public interest consideration in protecting the privacy of an identifiable individual. In the absence of any other public interest considerations, satisfaction of the prima-facie exemption justifies non-disclosure of the matter in issue.
27. In respect of the third party's mobile telephone number, I am satisfied that there are no public interest considerations in favour of disclosure. However, in respect of the balance of the Matter in Issue, there are a number of public interest considerations that must be balanced and accorded appropriate weight.
28. In *Page and Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-246, the Victorian AAT discussed the concept of 'unreasonable disclosure', that is, the test under the equivalent Victorian FOI legislation in respect of the personal affairs exemption. The EARC Report in Queensland has noted that the public interest test in section 44(1) of the FOI Act is not significantly different to the test of 'unreasonable disclosure' in other Australian jurisdictions. In *Page*, the Tribunal stated that determining whether disclosure is unreasonable:

Requires a balancing of interest: the right to personal privacy of an individual whose personal affairs may be unreasonably disclosed by granting access to the information and the object of the Act to extend as far as possible the right of the community to access to information in the possession of the Government or agencies ... More particularly, this balancing of interests requires a consideration of all of the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance. It is apparent that the purpose of s33(1) of the Act is to prevent unreasonable invasion of privacy of third parties.

Public interest considerations favouring disclosure

29. The applicant submits that:
 - he intends to pursue a second appeal to the High Court of Australia
 - by law any person who is writing a written appeal is entitled to all information given or collected whether this information is verbal, videoed by tape or written
 - he has not yet had his appeal to the High Court after 22 years in prison as an innocent man
 - it would be a miscarriage of justice for him to die in prison because the system has refused or hidden information which could prove his innocence
 - the public would be more interested in why an innocent man has been held in prison and why he would be refused access to information that would prove his innocence
 - the only public interest favouring non-disclosure would be from persons within the media and those who had an innocent man put in prison for a crime which new testing methods such as DNA testing can and would prove that innocence
 - as for the privacy of the deceased, what about the privacy of the accused who is still alive
 - the balance is 'well in favour of government agencies and not in the many innocent persons within the Queensland (prison) systems'
 - 'as for giving consent, the third person is deceased and to ask any others for her permission would not be in favour of others because they have been brainwashed into believing the accused is guilty which the evidence will prove he is innocent of'

30. In respect of the applicant's assertion that by law any person who is writing a written appeal is entitled to all information given or collected whether this information is verbal, videoed by tape or written, I note that the jurisdiction of this Office is defined in the provisions of the FOI Act. In this external review, the jurisdiction of this Office is confined to determining whether Dr Young's decision was made in accordance with the FOI Act.

31. Section 21 of the FOI Act provides that a person has a legally enforceable right to be given access under the Act to documents of an agency. However, section 4(3) of the FOI Act provides that:

Parliament also recognises there are competing interests in that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on—

(a) essential public interests; or

(b) the private or business affairs of members of the community about whom information is collected and held by government.

32. Section 4(4) of the FOI Act provides that the Act is intended to strike a balance between the competing interests identified above. This balance is principally achieved by the inclusion of various exemption provisions in Division 2 of Part 3 of the FOI Act. In this matter QH asserts that the public interest in the relevant privacy interests outweigh the public interest considerations in disclosure.

33. I note that in *Lovelock and Queensland Health* (2001) 6 QAR 24 (*Lovelock*), the applicant made the following submissions regarding public interest considerations in favour of disclosure (reproduced at paragraph 13 of the decision):

It is my submission that the rights of the individual to access such information as may be necessary to establish one's innocence within the operation of the criminal justice system must, other than in the most extraneous of circumstances outweigh any perceived infringement of another's personal privacy. Presumably, such would especially be the case in circumstances where the failure to establish innocence on the part of the accused will result in the imposition of a term of life imprisonment.

...

It is my submission that until such time as every avenue of appeal available to me pursuant to the criminal justice system has been exhausted then I ought to be afforded every opportunity to defend my innocence. Further, with respect, the comments made by members of the judiciary either at first instance or on appeal can not be taken to be conclusive determination of one's guilt or innocence. I am sure you would be well aware of the fact that many cases are left to the High Court in order for mistakes made within the criminal justice system to be addressed.

*Such an application is a legitimate pursuit of my rights of redress and as such ought not to be discarded out of hand. Further, although you correctly refer to various aspects of the transcript from my appeals to date, I am sure that you will be well aware of matter such as the ultimate outcome in the case of *R v Condren* or, perhaps even more appropriately, the matter of *R v Chamberlain* where in each case it was suggested that the Crown had "overwhelming" evidence of the accused's guilt, only to have their innocence established at a later date. It is, in itself, a miscarriage of justice for you to presume that the espousings of certain judges presupposes that any appeals by me will prove unsuccessful.*

34. Further, in *Fox and Queensland Police Service* (2001) 6 QAR 1 (*Fox*), the Information Commissioner recognised (at paragraph 23) that there is a public interest in enhancing

the operation of the criminal justice system and an applicant having access to information that may assist them to regain their liberty.

35. In light of the matters set out above, I recognise that there are public interest considerations favouring disclosure of some of the Matter in Issue.
36. However, as set out above in paragraphs 26 and 28, I must balance these interests against the right to personal privacy of individuals whose personal affairs may be unreasonably disclosed by granting access to the Matter in Issue.

Public interest considerations favouring non-disclosure

37. In my view, there are 2 categories of relevant public interest considerations favouring non-disclosure.

(i) Victim of violent crime

38. Non-disclosure is consistent with section 10(1) of the *Criminal Offence Victims Act 1995* (Qld) (COV Act) which provides that:

10 Privacy of victim to be protected and property returned

(1) *A victim's privacy should be protected ...*

39. A 'victim' is defined in section 5 of the COV Act as a person who has suffered harm from a violation of the State's criminal laws because of violence committed directly against the person or because of a relationship with or having intervened to assist a person against whom violence was committed.
40. I anticipate that consulting the family of the deceased about the possible release of documents under the FOI Act is likely to cause a significant degree of suffering to the victim's family.
41. The applicant's case has been heard in both the Queensland Supreme Court and the Queensland Court of Criminal Appeal. On 6 September 1988, the applicant's application for special leave to appeal to the High Court of Australia was refused.
42. Having carefully reviewed the Matter in Issue, it is my view that:
 - a) a considerable amount of the Matter in Issue concerns a victim of a violent crime
 - b) there are very strong public interest considerations:
 - against disclosure of information concerning victims of violent crime in circumstances where the matters have been dealt with by the courts
 - in not inflicting further suffering and concern on the families of victims of crime

(ii) Intensely personal information

43. In *GDW and Queensland Police Service*, S373/03, (20 November 2003, Unreported), the applicant sought access to information regarding sexual abuse allegations made to the Queensland Police Service by his daughter. The Information Commissioner recognised in this decision that there is a very strong public interest in protecting intensely personal information.

44. Having carefully reviewed the Matter in Issue, it is my view that:
- a) a considerable amount of the Matter in Issue concerns intensely personal information
 - b) there are very strong public interest considerations against disclosure of intensely personal information.

Conclusion

45. In my view, disclosure of the Matter in Issue would disclose information that is properly characterised as information concerning the personal affairs of a person, thereby establishing a public interest consideration favouring non-disclosure.
46. After carefully considering the public interest considerations for and against disclosure of the Matter in Issue, I am satisfied that the arguments in favour of disclosure do not outweigh the privacy interests favouring non-disclosure.
47. I therefore find that the Matter in Issue qualifies for exemption under section 44(1) of the FOI Act.

Decision

48. I affirm the decision of Dr Jeanette Young made on 20 December 2006.
49. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).

F Henry
Assistant Commissioner

Date: 29 June 2007